FILED
FEB 22 1990
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 89-1180

IN THE

Supreme Court of the United States

October Term, 1989

MICHAEL D. BARRETT and G. LAMAR CRITTENDEN, JR.,
Petitioners,

v.

CONTINENTAL ILLINOIS NATIONAL BANK
AND TRUST COMPANY OF CHICAGO,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

GARRETT B. JOHNSON
(Counsel of Record)
CLAIRE P. MURPHY
KIRKLAND & ELLIS
200 East Randolph Drive
Chicago, Illinois 60601
(312) 861-2000

Attorneys for Respondent Continental Bank

Pandick Midwest • (312) 733-6000

BEST AVAILABLE COPY

10 pp

QUESTION PRESENTED

Whether a plaintiff who offers entire deposition transcripts into evidence without reading any portion in open court, and who in argument explains to the trial court how that deposition testimony supports his case, is deprived of due process by the court's grant of a Rule 41(b) dismissal motion at the completion of plaintiff's proof.

RULE 29.1 LISTING

Respondent Continental Bank, N.A., formerly Continental Illinois National Bank and Trust Company of Chicago, has a parent corporation, Continental Bank Corporation. In addition, respondent Continental Bank lists the following non-wholly owned subsidiaries:

Lease Continental Limited United Kingdom
Justin Inc. Chile Ltda. Chile
CIC Trading, S.A.
Compania Chilena De Generacion, Electricia S.A. Chile
Tanner & Continental Illinois S.A. Corredores De Bolsa Chile
Tanner & Continental Illinois S.A. Administradora De Fondos Mutudos Chile
Industria Azucarera National S.A. Chile
Laboratorios Chile, S.A.
Transradio Chilena Compania de Telecommunicaciones S.A. Chile
Continental Banco S.A. Brazil

TABLE OF CONTENTS

	PAGE
Question Presented	i
Rule 29.1 Listing	ii
Statement of the Case	1
Reasons for Denying the Writ	2
I. Neither the Court of Appeals Nor the District Court Decided the Issue on Which Petitioners Seek Review	2
II. Petitioners Received a Fair Trial, Consistent with Due Process Requirements	3
Conclusion	6

TABLE OF AUTHORITIES

Cases:

Armstrong v. Manzo, 380 U.S. 545 (1965)	5
Donnelly v. DeChristoforo, 416 U.S. 637 (1974)	5
Mackey v. Montrym, 443 U.S. 1 (1979)	5
Morgan v. United States, 298 U.S. 468 (1936)	5
Morgan v. United States, 304 U.S. 1 (1938)	6

Statute:

Mass. Gen. L. ch. 109 A. §5	3

Rule:

Fed. R. Civ. P. Rule 41(b)	*passim*

No. 89-1180

IN THE

Supreme Court of the United States

October Term, 1989

MICHAEL D. BARRETT and G. LAMAR CRITTENDEN, JR.,
Petitioners,

v.

CONTINENTAL ILLINOIS NATIONAL BANK
AND TRUST COMPANY OF CHICAGO,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

STATEMENT OF THE CASE

In addition to the petitioners' statement of the case, respondent Continental Bank states the following:

At several points during petitioners' two-day trial presentation, petitioners' counsel voiced his intention to offer depositions into evidence and stated that he was not certain whether he would read the depositions in court, have them read, or just submit the transcripts. (Tr. 17, 92, 135) Although the trial judge declined counsel's sidebar suggestion that he read the depositions overnight (Tr. 135), the court did not restrict the way in which petitioners were to present or use the depositions

during the trial proceedings. Ultimately, petitioners decided to offer the two deposition transcripts into evidence without reading them or having them read as part of their trial presentation. Petitioners' counsel said he was doing so "just to conserve time." (Tr. 2-67)

After petitioners rested their case, respondent moved for dismissal pursuant to Rule 41(b) of the Federal Rules of Civil Procedure. (Pet. A11) In responding to that motion, petitioners' counsel referred to, and paraphrased from, one of the depositions, arguing that it was part of the evidence that should defeat respondent's motion. (*Id.* A14) Although the trial judge did not limit the time or scope of petitioners' argument (*id.* A15), counsel did not refer in the argument to the other deposition. At the conclusion of petitioners' argument, the trial court granted respondent's 41(b) motion. (*Id.*)

In affirming, the Court of Appeals for the First Circuit did not address the issue on which petitioners seek review in this Court. Neither did petitioners directly brief that issue to the court of appeals, although they did urge it as one point in their petition for rehearing. (Pet. 5-8) The court of appeals denied that petition without opinion. (Pet. A17)

REASONS FOR DENYING THE WRIT

I. Neither the Court of Appeals Nor the District Court Decided the Issue on Which Petitioners Seek Review.

In seeking review, petitioners urge this Court to exercise its supervisory powers to restore "public confidence in the basic fairness of the judicial system." (Pet. 11) However, petitioners do not explain how "public confidence" can be eroded by a First Circuit opinion and district court decision that are silent on the due process issue petitioners wish to raise here.

The reason for the court of appeals' silence is that petitioners did not advance their due process argument before that

court until their rehearing petition. Petitioners' original briefing on appeal instead urged that the trial court had decided the case incorrectly on the facts and the law. The First Circuit opinion addresses those arguments in a straightforward fashion, rejecting them and affirming the trial court.[1]

Any precedential impact of the First Circuit's opinion is limited to a matter on which petitioners do not seek review, the court's interpretation of Massachusetts' Uniform Fraudulent Conveyance Act, M.G.L. ch. 109 A, § 5. (*See* Pet. A3, A6-A10) The First Circuit opinion cannot serve as an unacceptable precedent on a due process issue it does not even address. There is therefore nothing in this case that calls for this Court to exercise its supervisory powers.

II. Petitioners Received a Fair Trial, Consistent with Due Process Requirements.

Petitioners argue that they were deprived of due process because the trial court could not have had time to read two deposition transcripts before his ruling on respondents' Rule 41(b) motion to dismiss. But their argument ignores two central aspects of the trial court proceedings. First, it was petitioners' counsel, not the trial judge, who made the decision to offer deposition transcripts into evidence without reading them at trial. (Tr. 2-67) Second, in argument on respondent's motion to dismiss, petitioners' counsel had an opportunity to, and did, refer the judge to the deposition testimony he thought helped his case. (Pet. A13-A15)

During the first day of trial, counsel for petitioners made it known that he would offer depositions into evidence, but noted three times that he was not yet certain whether he would take the time to read them or have them read. (Tr. 17, 92, 135) The trial judge voiced no preference, at any point during the trial, on how petitioners should present the deposition testimony.

---

[1] The Court of Appeals did not reach the trial court's alternative ruling that the suit was barred by *res judicata*. (Pet. A10)

Toward the end of the presentation of his evidence, petitioners' counsel chose to offer the two deposition transcripts in their entirety into evidence without reading them in court:

> MR. WHITESIDE: I'd like to offer the deposition transcripts as Exhibits—as testimony and as exhibits—and I would be happy to have them read, but I also feel that, just to conserve time, I will put in the transcripts and the exhibits. (Tr. 2-67)
>
> * * *
>
> THE COURT: All right. Those will be Plaintiffs' Exhibits 17 and 18. (Tr. 2-68)

Petitioners could have, and if they wished to emphasize the depositions' significance should have, read the important parts of the depositions at trial. Since petitioners freely chose not to do so, they should not now complain that the depositions did not receive sufficient attention.

But petitioners push their argument even further, wrongly contending that the trial court granted the Rule 41(b) motion "without . . . in any way considering this testimony." (Pet. i) The trial record shows just the opposite. In his argument against the motion to dismiss, petitioners' counsel referred the trial court to one of the depositions, paraphrased a passage from it, and told the court why he thought that testimony supported petitioners' claim:

> But I suggest that there is a reason to assume that Eastern, which had just cleared out everything that it had and was awaiting for the transfer of its assets so that it could close its accounts and that would be the end of it, I think it is unreasonable to assume that that money stayed there any longer than was necessary. It was the completion of a liquidation which was, you will see when you read Mr. Finder's transcript—it was the completion of a liquidation that was begun when Michael Maduff walked into Continental's office and said: "My companies are hemorrhaging. I can't go on." He used the word hemorrhaging. "My companies are hemorrhaging," and we have got to do a

> liquidation, and Continental can draw up a plan for the liquidation of Eastern, and I suggest, your Honor, that the situation in June has not been fairly proved to be that of anything but an unreasonably small capital. (Pet. A14)

In this argument to the trial court, petitioners made basically the same points and discussed the same evidence that they now argue to this Court was "evidence not considered" from the Finer deposition. (Pet. 13-14) While it is certainly true that the trial judge was not persuaded by this argument when he ruled against petitioners, there is nothing in the record that shows he failed to consider it. (Pet. A15)

Petitioners' counsel chose not to include in his trial court argument the contentions petitioners advance here about the Van der Weele deposition testimony. (Pet. 14) He was not, however, prevented by the trial judge from doing so. Indeed, the trial judge did not limit in any way the argument petitioners made, nor the evidence they referenced. (Pet. A13-15)

In any event, petitioners' argument about the Van der Weele testimony describes what were essentially uncontested facts about Eastern Capital's financial circumstances in May, 1984. The trial court ruled against petitioners, however, and the court of appeals affirmed, because "Eastern was unquestionably solvent by June 1, 1984, and had sufficient assets to cover all of [petitioners'] potential claims against it by that time." (Pet. A9)

Due Process guarantees a litigant notice and the opportunity to be heard, not a perfect trial. *See, e.g., Mackey v. Montrym,* 443 U.S. 1, 13 (1979); *Donnelly v. DeChristoforo,* 416 U.S. 637, 642 (1974); *Armstrong v. Manzo,* 380 U.S. 545, 552 (1965). *Morgan v. United States,* 298 U.S. 468 (1936), the case on which petitioners place most reliance, does not hold otherwise. In *Morgan*, the Secretary of Agriculture decided the case without participating in the hearing. This case is wholly different. The trial judge handled this case from its inception and was at the trial to hear petitioners' presentation of the evidence and consider counsel's arguments about that evidence.

It is "not the function of the court to probe the mental processes of the [judge] in reaching his conclusions if he gave the hearing which the law required." *Morgan v. United States*, 304 U.S. 1, 18 (1938).

Petitioners in this case were given not just one opportunity, but two, to have their evidence and arguments heard. In their evidentiary presentation, petitioners had the opportunity to present the deposition testimony in whatever manner they chose. In their subsequent argument to the trial court, they had the opportunity to raise whatever evidence they thought supported their claims. Petitioners took those opportunities, presented and argued their case, and lost.

CONCLUSION

For all the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

GARRETT B. JOHNSON
(Counsel of Record)
CLAIRE P. MURPHY
KIRKLAND & ELLIS
200 E. Randolph Drive
Chicago, Illinois 60601
(312) 861-2000

February 22, 1990